Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1485

ROBERT D. BIGELOW,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner Robert D. Bigelow respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on January 5, 1977.

OPINION BELOW

On October 20, 1976, the United States Court of Appeals for the Ninth Circuit filed an opinion vacating and remanding petitioner's conviction. A copy of

said opinion appears herein as Appendix "A". On January 5, 1977, the Court entered an order in which it granted the Government's motion to correct and augment the record on appeal; granted the Government's petition for rehearing; withdrew the opinion filed October 20, 1976 and in a memorandum affirmed petitioner's conviction. A copy of the aforesaid order and memorandum appear herein as Appendix "B". The memorandum incorporated by reference the opinion of United States District Judge William H. Orrick, the trial judge in the instant case, filed on November 19, 1975. A copy of Judge Orrick's opinion appears herein as Appendix "C". Petitioner's petition for rehearing and suggestion for appropriateness of consideration en banc was denied on March 1, 1977. A copy of the order denying the petition for rehearing and rejecting the suggestion for rehearing en banc appears herein as Appendix "D". On March 16, 1977, the Hon. William H. Rehnquist, Associate Justice of the Supreme Court of the United States signed an order extending the time for filing a Petition for a Writ of Certiorari to and including April 29, 1977. A copy of Justice Rehnquist's order appears herein as Appendix "E". This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the informant's affidavit contain a sufficiently detailed statement of the informant's version of the facts and circumstances surrounding the

offense to enable the trial court to determine during the *ex parte in camera* hearing whether the informant's testimony would be helpful to the defense of the accused thus requiring disclosure of the informant's identity under *Roviaro v. United States,* 353 U.S. 53 (1957)?

2. Does the Ninth Circuit's ruling that the exclusion of testimony proffered by petitioner's brother was harmless error conflict with the principles enunciated by this Court for the application of the harmless error doctrine in criminal cases?

STATEMENT OF THE CASE

On August 7, 1975, petitioner was indicted on one count of having violated Title 21 U.S.C. §841(a)(1) [distribution of approximately 12.1 grams of heroin] (Clerk's Transcript, hereinafter "C.T." 1). On October 7, 1975, petitioner moved for the revelation of the identity and production of the informant (C.T. 4-10). The motion was heard on October 16, 1975, at which time the trial court ordered that the hearing on the motion be continued until October 21, 1975, and directed the Government to lodge with the trial court, *in camera,* certain affidavits relevant to petitioner's motion to reveal and produce the informant (C.T. 37). On or about October 20, 1975, the Government lodge with the trial court, *in camera,* three affidavits (C.T. 38 and Affidavit of Julie Frost contained in augmentation of record on appeal ordered on January 5, 1977). In an opinion dated November

19, 1975 the trial court denied petitioner's motion to reveal and produce the informant. (See Judge's Orrick's opinion contained in augmentation of record on appeal ordered on January 5, 1977).

Petitioner's jury trial began on October 28, 1975 and on October 30, 1975, the jury found petitioner guilty as charged. On December 3, 1975, petitioner was sentenced to the custody of the Attorney General under the provisions of the Federal Youth Corrections Act [Title 18 U.S.C. §5017(c)]. Petitioner filed a Notice of Appeal on December 11, 1975, and is presently at liberty upon having posted bail pending appeal set by the trial court (C.T. 145).

On October 20, 1976, the Ninth Circuit vacated petitioner's conviction and remanded the case to the trial court. The decision was based upon the fact that the trial court had erred in basing its denial of petitioner's motion for revelation and production of the informant upon an affidavit prepared by Drug Enforcement Administration Agent Dijamco and lodged by the Government for *in camera* inspection by the trial court in ruling upon petitioner's informant motion. The Government subsequently moved for rehearing and augmentation of the record on appeal to include the affidavit of the informant which apparently had been inadvertently omitted from any mention in the record of the trial court but which the trial judge stated had been before him and considered in ruling on petitioner's motion for revelation and production. The Ninth Circuit granted the motion to augment the record on appeal, withdrew

its Opinion of October 20, 1976, and in a memorandum filed on January 5, 1977, affirmed petitioner's conviction.

STATEMENT OF THE FACTS

On June 11, 1975, an informant introduced Special Agent Sal Dijamco of the Drug Enforcement Administration to Richard Gallegos (Gallegos was also named as petitioner's co-defendant but entered a plea of guilty prior to trial) at Gallegos' residence in Fremont, California (Reporter's Transcript, hereinafter "R.T." 52 and 81). The following is Agent Dijamco's testimony of what transpired at Gallegos' residence on June 11, 1975. Dijamco told Gallegos that he (Dijamco) was interested in purchasing one ounce of pure heroin. Gallegos replied that "it was no problem"; that all he (Gallegos) had to do was to contact "Robbie", who had pure heroin (R.T. 53-54). Gallegos added that "Robbie" was not Gallegos' regular source of supply but that he liked "Robbie" (R.T. 54 and 86). Gallegos went to the telephone and said he was going to call "Robbie". Before he could dial, the telephone rang. Gallegos answered it, then said "It's Robbie" (R.T. 54). Gallegos then stated to the person on the other end of the telephone line that Gallegos "needed one right now" (R.T. 55). Gallegos then asked Dijamco how long it would take Dijamco to get the cash for the purchase. Dijamco replied that he had the cash on his person and Gallegos repeated this into the telephone (R.T. 55). Gallegos and Dijamco then left Gallegos' residence

and drove to Gallegos' brother's residence so that Gallegos could obtain a "kit" to test the quality of the narcotics (R.T. 58). The two men returned in approximately forty minutes. When they entered Gallegos' residence they observed petitioner, his brother, Gary Bigelow, and a third person in the living room (R.T. 59). Gallegos and petitioner exchanged greetings but petitioner did not talk to Dijamco (R.T. 59). Petitioner and Gallegos then went into a back room of the house (R.T. 60). After approximately five to ten minutes later Gallegos asked Dijamco to come into the bathroom. After the two men were inside the bathroom, Gallegos told Dijamco that Gallegos had tested the narcotics; that it was of good quality; and that he wanted Dijamco to meet petitioner (R.T. 61). Gallegos told Dijamco that petitioner was "paranoid" and therefore that Dijamco should not discuss the price of the narcotics with petitioner (R.T. 61). Dijamco went into the rear room with Gallegos where petitioner was standing at the end of a table on which a plastic bag containing a brown powdery substance, the narcotics "kit" and miscellaneous books and papers were located (R.T. 62). The narcotics kit appeared to have been used (R.T. 62). Gallegos introduced petitioner to Dijamco and told Dijamco: "This is Robbie. He's family. He's cool. Tell him exactly what you told me" (R.T. 63). Dijamco told petitioner that Dijamco was interested in purchasing pure heroin and could purchase large quantities of narcotics on a regular basis (R.T. 63). Petitioner did not respond to this statement (R.T.

63). Gallegos picked up the plastic bag containing the brown powdery substance and told Dijamco that he would personally guarantee that this will take four hits (R.T. 63). Gallegos turned to petitioner for confirmation and asked, "Robbie, this will take four hits, won't it?" (R.T. 63). Petitioner stated that he "didn't want to talk" (R.T. 64). Gallegos insisted and said to petitioner, "All I want to know is how many hits the narcotics will take". Petitioner replied "three and one-half to four" (R.T. 64). Gallegos told Dijamco that Gallegos and petitioner would discuss price and Gallegos and petitioner walked down the hallway where they engaged in a whispered conversation the substance of which Dijamco could not overhear (R.T. 69). Gallegos then returned to the rear room and told Dijamco that the price would be fifteen hundred dollars per ounce (R.T. 71). Dijamco stated he would purchase one-half ounce. Gallegos stated that the price would be seven hundred and seventy five dollars for the half ounce (R.T. 71). Gallegos picked up the bag and left the rear room stating that he would weigh a half ounce out of the bag (R.T. 71). Gallegos subsequently returned to the room and handed Dijamco a plastic bag containing a brown powdery substance (R.T. 75). Gallegos and Dijamco went into the kitchen where Gallegos gave petitioner some of the money which Dijamco had given him and said that he (Gallegos) would pay petitioner the rest of the money he owed petitioner later (R.T. 76). Petitioner put the money in his pocket and departed the residence (R.T. 77).

Petitioner testified in his own behalf. He stated that he had telephoned Gallegos on June 11, 1975, in an attempt to collect a three hundred dollar ($300.00) debt which Gallegos owed him (R.T. 152). During the course of the telephone conversation Gallegos stated that he had petitioner's money and the petitioner should come to his (Gallegos') residence to collect it (R.T. 152). Petitioner, his brother, and a friend drove to Gallegos' house but Gallegos was not there went they arrived (R.T. 154). Subsequently, Gallegos and Agent Dijamco arrived and Gallegos asked if he could talk with petitioner (R.T. 155). Petitioner and Gallegos went into the rear room of the residence where petitioner again asked Gallegos if he had petitioner's money. Gallegos assured petitioner that he did (R.T. 157). At the same time Gallegos also "fixed" some narcotics (R.T. 158). Gallegos left the room (R.T. 159). He returned with Dijamco and the two men began discussing the sale and purchase of narcotics (R.T. 160). Dijamco asked if petitioner could obtain ounce quantities of heroin for Dijamco (R.T. 159). Petitioner did not respond to Dijamco's question (R.T. 160). Dijamco and Gallegos discussed how many cuts the narcotics could take and Gallegos asked petitioner to confirm Gallegos' statement to Dijamco concurring the quality of the narcotics (R.T. 161). Petitioner testified he did not remember telling Dijamco that the narcotics could be cut "three and one-half to four times" (R.T. 162). At the time petitioner testified that he was upset and angry because of the position in which

Gallegos had placed him (R.T. 162). Petitioner and Gallegos then walked down the hall where petitioner asked Gallegos "what he (Gallegos) was doing" (R.T. 162). Gallegos subsequently paid petitioner the three hundred dollars which Gallegos owed petitioner and petitioner left the residence with his brother (R.T. 166). Petitioner denied having given any narcotics to Gallegos (R.T. 167).

Petitioner called his brother, Gary Bigelow, as a witness in petitioner's behalf. When petitioner's trial counsel attempted to elicit testimony concerning what petitioner or Gallegos had said in Gary Bigelow's presence, the prosecutor objected on the grounds that the question called for hearsay (R.T. 221-223). The trial court sustained all such objections (R.T. 214 and 224).

REASONS FOR GRANTING THE WRIT

I

THE INFORMANT'S AFFIDAVIT DID NOT CONTAIN A SUFFICIENTLY DETAILED STATEMENT OF THE INFORMANT'S VERSION OF THE FACTS AND CIRCUMSTANCES SURROUNDING THE OFFENSE TO ENABLE THE TRIAL COURT TO DETERMINE WHETHER THE INFORMANT'S TESTIMONY WOULD BE HELPFUL TO PETITIONER'S DEFENSE, THUS REQUIRING DISCLOSURE OF THE INFORMANT'S IDENTITY UNDER ROVIARO v. UNITED STATES

In *Roviaro v. United States,* 353 U.S. 53 (1957) this Court held that the Government's privilege to withhold the identity of an informant must give way where "the disclosure of the informant's identity . . .

is relevant and helpful to the defense of an accused or is essential to a fair determination of a cause" 353 U.S. at 60-61. After the decision in *Roviaro,* a line of cases evolved which held that where an informant was a material witness on the question of guilt, the informant's identity would be "relevant" within the meaning of *Roviaro,* and the interest of the Government in maintaining the secrecy of its sources of information would have to yield to the defendant's interest in obtaining a fair trial. An informant is a "material witness on the question of guilt" where the informant is shown to be a participant in and/or a percipient witness to the alleged activity. *United States v. Barnett,* 418 F.2d 309, 312 (6th Cir. 1969); *Lopez-Hernandez v. United States,* 394 F.2d 820, 820 (9th Cir. 1968); *Gilmore v. United States,* 256 F.2d 565, 567 (5th Cir. 1958); *United States v. Roberts,* 338 F.2d 646 (2d Cir. 1968); *United States v. Clarke,* 220 F.Supp. 905 (E.D.Pa. 1963). As recently stated by the Eighth Circuit:

> "We think it clear from the cases decided since *Roviaro* that where the witness (informant) is an active participant or witness to the offense charged, disclosure will almost always be material to the accused's defense." *United States v. Barnes,* 486 F.2d 776, 778-779 (8th Cir. 1973).

This method of determining when disclosure was mandated under *Roviaro* addressed itself only to the question of whether the informant's testimony would be "relevant" because the informant's version of the facts was not available to the trial court. In ruling

on a motion for disclosure, the Court could not tell whether the informant's testimony "would be helpful to the defense of an accused". This resulted in situations where the trial court would disclose the identity of the informant upon a showing that the informant was "relevant" only to find that in fact the informant's testimony would not be "helpful to the defense of an accused". In such circumstances, the Government's interest in maintaining the secrecy of its sources of information was unprotected while the defendant's interest in obtaining a fair trial was not advanced because the informant could not in actuality provide favorable testimony.

Recently a number of courts have adopted the *in camera* procedure for determining whether a motion to reveal the identity of an informant should be granted. *United States v. Rawlinson,* 487 F.2d 5 (9th Cir. 1973) *cert. denied* 415 U.S. 984 (1974); *United States v. Lloyd,* 400 F.2d 414 (6th Cir. 1968); *United States v. Jackson,* 384 F.2d 825 (3d Cir. 1967) *cert. denied* 392 U.S. 932 (1968); *United States v. Untiedt,* 493 F.2d 1056 (8th Cir. 1974) *cert. denied* 419 U.S. 862 (1975); *United States v. Freund,* 533 F.2d 873 (5th Cir. 1976); Supreme Court Standard 510(c)(2). The *in camera* procedure is an attempt to allow the trial court to determine whether the testimony of the informant will be favorable to the defense of an accused prior to disclosing the informant's identity. The procedure contemplates that the informant's version of the facts be placed before the trial court in the form of an affidavit or an interview of

the informant by the trial court. The trial court should thus be in a position to ascertain whether the informant's recital of events is substantially similar to the agent's and thus disclosure would not be required or whether the informant's testimony would lend credence to the defendant's theory, thus requiring disclosure. *United States v. Freund, supra,* 533 F.2d at 877.

The defendant and his attorney are normally excluded from participating in the *in camera* hearing. It is thus up to the trial court to insure that the informant's complete version of the facts is placed before it. In its opinion dated October 20, 1976 in petitioner's case, the Ninth Circuit noted the dangers inherent in the *in camera* procedure and the responsibilities of the trial court in such circumstances:

> "The great danger of secret *ex parte* hearings is that they may fail to be sufficiently probative; the only safeguard is the commitment of the trial judge to a full and probative inquiry. Unless the trial judge can satisfy himself as to what testimony the informant would offer if called as a witness, he cannot determine whether the informant's testimony will be of assistance to the defendant."

The Ninth Circuit found in its October 20, 1976 opinion that:

> "(W)ith the aid of materials obtained during discovery Bigelow demonstrated that the informant had been in the house in which the heroin sale had taken place and had witnessed part of the activity surrounding the sale."

It noted that:

> "Thus, while *Roviaro* makes it clear that each case will turn on its own facts, it also stands for the proposition that, absent other evidence showing the Government's interest in keeping the informant's identity confidential should it control, a showing like that in *Roviaro* carries, *prima facie,* the defendant's burden of establishing need for the disclosure. Such a showing was made here. . . ."

The material obtained during discovery referred to by the Ninth Circuit was Agent Dijamco's report of investigation which set forth in twenty-six paragraphs the Government's theory of their case against petitioner. This report was before the trial court in ruling on petitioner's motion for disclosure. (C.T. 28-34). The report clearly indicates that the Government's theory of the case was *not* that Agent Dijamco had observed petitioner distribute narcotics to Richard Gallegos; but rather that based upon all of the circumstances set forth in the report one could infer that petitioner had supplied to Gallegos the contraband which Gallegos handed to Agent Dijamco.

The informant's version of the offense was set forth in a two-paragraph, essentially conclusory, affidavit:

> "1. On early part of June, on three occassions, I spoke to Richard C. Gallego's on the phone, I advised him that I new someone that was interested in buying Herion, Richard C. Gallego's said he was interested in meeting that person but that he was leary. All of this happened before June

11, 1975. On June 11, 1975 I Introduced Sal to Richard C. Gallego's. This is the only time that I and Agent Sal Deljomico were present in Gallego's Company. I did not participate in conversation between Gallego's and the Agent regarding herion negotiations. I instead engaged Denese Gallegos in general conversation.

2. The only part I saw of the actual transaction was when Gallego's went to the kitchen to weigh the herion. I heard him say it was good herion. After everbody came out of the back room Richard gave Robert Bigelow some money, Richard said something to Bigleow that I do not remnber."

Despite the fact that Agent Dijamco's report of investigation, when read in conjunction with the informant's affidavit, clearly established that the informant was in a position to hear the discussions of the parties, the affidavit does not address itself to what discussions attributed to the parties by Agent Dijamco's report the informant did or did not overhear. Such information is relevant to the issue of whether the disclosure of the informant's identity would be helpful to the defense of petitioner.

> "Here was a person affirmatively shown to have been within hearing distance who was an actual witness to the crucial part of the transaction. The conversation, both what was said, how it was said, and what was not said, presented matters of great materiality. It was of immediate relevance." *Gilmore v. United States, supra,* 256 F.2d at 567.

The importance of such testimony in petitioner's case cannot be overemphasized. As previously noted,

Agent Dijamco's report made it clear that the case against petitioner rested entirely upon circumstantial evidence. The fact that the informant did not observe the "actual transaction" was of little relevance in petitioner's case. Of great import in determining whether the informant's testimony would have been helpful to the defense would have been to know the informant's version of the conversation, both what was said, how it was said and what was not said. . . ." *Id.* This information was not made available to the trial court in the informant's affidavit.

Petitioner would note that this court has not reexamined the issue of under what circumstances the identity of an informant should be disclosed since its decision in *Roviaro.* In *Alderman v. United States,* 394 U.S. 165, 89 S.Ct. 961 (1969), this Court seemed to approve of the *in camera* hearing as a method of resolving motions for disclosure of an informant's identity. However the nature and scope of the information which must be presented at an *in camera* hearing and the responsibilities of the trial judge in connection with such a hearing have not been considered by this Court. As the Ninth Circuit noted in its opinion of October 20, 1976, "the Government's use of secret informants has created a plethora of problems incapable of easy or satisfactory resolution". Petitioner agrees and respectfully urges that the instant petition be granted so that this Court may determine this important question of law which has not been but should be, settled to provide guidance to lower courts when using the *in camera* procedure

in connection with ruling upon motions for disclosure under *Roviaro.*

II

THE NINTH CIRCUIT'S RULING THAT THE EXCLUSION OF TESTIMONY PROFFERED BY PETITIONER'S WITNESS WAS HARMLESS ERROR IS IN CONFLICT WITH THE PRINCIPLES ENUNCIATED BY THIS COURT FOR APPLICATION OF THE HARMLESS ERROR DOCTRINE IN CRIMINAL CASES

The Court of Appeals found that the exclusion of testimony offered by petitioner's brother, who was in Gallegos' house at the time of the sale was error. The excluded testimony was that petitioner had become very upset and had yelled at Gallegos "What's going on? What's going on here? . . . Give me the money so we can go . . . We want to go". The court held the error harmless because petitioner's brother suffered from a hearing impairment and because it found the excluded testimony would be cumulative of testimony given earlier by petitioner's brother.

Rule 52(a) defines as "harmless" any error which does not affect substantial rights. The test for what type of error affects a substantial right was articulated by this Court in *Kotteakos v. United States,* 328 U.S. 750, 763 (1948).

> "But, if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The reasons given by the Court of Appeals for finding the error harmless are not persuasive. First, the fact that petitioner's brother suffered from a hearing loss is in no way relevant to the fact that he heard petitioner shout certain remarks and observed petitioner become very upset. The hearing loss might be relevant if the proffered testimony had been that petitioner's brother did not hear certain remarks that petitioner or some other person had made.

Nor can the excluded testimony be dismissed as "substantially cumulative". The particular remarks to which petitioner's brother was attempting to testify ("What's going on? . . . What's going on here? . . . Give me the money so we can go . . . We want to go.") are not merely cumulative to his earlier testimony that petitioner was upset and angry at Gallegos, for the excluded testimony would have bolstered petitioner's version of the facts in a manner in which testimony as to petitioner's mood alone could not.

Petitioner testified that he had gone to Gallegos' residence to pick up money owed him by Gallegos for a personal loan, and that petitioner had no idea upon entering the premises that a narcotics sale was going to take place (R.T. 173 and 195). Petitioner further testified that once he ascertained the nature

of the business that Gallegos and Agent Dijamco were transacting he became very upset and angry at Gallego's involving petitioner in an illicit transaction. Testimony that petitioner had shouted "What's going on here?" and "Give me the money so we can go . . . We want to go" clearly bolstered petitioner's claim more directly and unambiguously than testimony that generally indicated that petitioner was for some unarticulated reason angry and upset.

Professor Wright notes that the single most significant factor in weighing whether an error is harmful is the strength of the case against the defendant. See, e.g., *Glasser v. United States,* 315 U.S. 60, 67 (1942); *Krulewitch v. United States,* 336 U.S. 440, 444-445 (1949); *United States v. Taylor,* 508 F.2d 761 (5th Cir. 1975); *United States v. Workman,* 470 F.2d 151 (4th Cir. 1972).

As the statement of facts herein shows, the case against petitioner at trial was based exclusively upon circumstantial evidence. Agent Dijamco was the only witness to testify for the Government. He did not testify that he personally observed petitioner distribute narcotics to Richard Gallegos. With the exclusion of petitioner's brother's testimony, petitioner became the only witness called by the defense.

That the jury evidently believed Agent Dijamco's version of the facts is not dispositive of the issue of whether the exclusion of petitioner's brother's testimony was harmless error.

> "While there was sufficient evidence for the jury, the case against petitioner was not open and shut. Since the scales were quite evenly balanced, we feel the jury might have been influenced by the erroneous charge." *Bihn v. United States,* 328 U.S. 633, 639 (1945).

Petitioner respectfully submits that the Ninth Circuit's application of the harmless error doctrine is at odds with the principles enunciated by this Court in *Kotteakos* and *Bihn* and respectfully urges this Court to grant the instant petition to review this particular ruling of the Ninth Circuit.

Dated, San Francisco, California,
April 19, 1977.

Respectfully submitted,
RICHARD B. MAZER,
Attorney for Petitioner.

(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 75-3845

United States of America,
Plaintiff-Appellee,

vs.

Robert D. Bigelow,
Defendant-Appellant.

[October 20, 1976]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: DUNIWAY and CARTER, Circuit Judges,
and BURNS,* District Judge

DUNIWAY, Circuit Judge:

Bigelow was found guilty by a jury of distributing a controlled substance, heroin, in violation of 21 U.S.C. § 841(a)(1). He appeals from the judgment of conviction. We vacate and remand.

The facts can be summarized briefly. On the pretense that he was interested in purchasing heroin,

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*The Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

Sal Dijamco, an agent for the Drug Enforcement Administration, was introduced by an unidentified informant to one Richard Gallegos, a codefendant. Gallegos contacted Bigelow, who came to Gallegos' home and there watched Gallegos sell Dijamco a half-ounce of heroin for $775 in cash. Gallegos immediately handed a part of the cash to Bigelow.

The government argued that the defendant was a knowing participant in this transaction. Bigelow argued that he was an innocent bystander, who had come to Gallegos' home to collect a $300 debt. The trial was a credibility contest involving three witnesses, Bigelow and his brother, Gary, for the defense, and Dijamco for the prosecution. The jury evidently believed Dijamco.

On appeal, Bigelow assigns as error the district court's refusal to require the government to reveal the informant's identity; its admission of hearsay declarations of Gallegos identifying Bigelow and his "supplier," and its exclusion of other out-of-court statements by Bigelow to which his brother Gary was prepared to testify.

I. *Non-disclosure of informant's identity.*

By a timely pretrial motion, Bigelow sought to discover the name and whereabouts of the informant. The government resisted. With the aid of materials obtained during discovery, Bigelow demonstrated that the informant had been in the house in which the heroin sale had take place and had witnessed part of the activity surrounding the sale. The district court ordered the government to file appropriate affidavits

in camera so that the judge could determine whether the informant's testimony would be sufficiently "relevant and helpful," *Roviaro v. United States,* 1957, 353 U.S. 53, 60, to require that her identity be disclosed. After the affidavits were filed, the court upheld the government's claim of privilege.

On June 8, 1976, we granted Bigelow's motion, which was based on an uncontested showing that the government had disclosed the informant's identity in another case pending in the court below, that the *in camera* affidavits be disclosed and made part of the record. We also called for supplemental briefs, and the case was submitted when the last brief was received on July 19, 1976. The first affidavit, by an assistant United States attorney in charge of prosecution, simply recounted his orders to special agent Dijamco to "advise the informant [by telephone] of certain subjects to which the informant had to respond by affidavit. . . ." The second affidavit was not by the informant as the assistant United States attorney had ordered, but by agent Dijamco. We reproduce it in full in the margin.[1]

---

[1]AFFIDAVIT

STATE AND NORTHERN DISTRICT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO } ss.

I, SAL DIJAMCO, being first duly sworn, depose and declare as follows:

I am a Special Agent with the Drug Enforcement Administration, United States Department of Justice, and have been employed in Federal narcotics work for approximately three years.

The informant SR350030 and I were present together in defendant Richard C. GALLEGOS' residence solely on the day of

The government's use of secret informants has created a plethora of problems incapable of easy or satisfactory resolution. In deciding whether to reveal an informant's identity, the district court must balance two essentially noncomparable quantities, "the public interest in protecting the flow of information against the individual's right to prepare his defense." *Roviaro, supra,* 353 U.S. at 62. To facilitate the process, this court in *United States v. Rawlinson,* 9 Cir., 1973, 487 F.2d 5, 7, *cert. denied,* 1974, 415 U.S. 984, endorsed the use of an *in camera* proceeding in which the judge interviewed the informant and concluded that his testimony would not help the defendant. The *in camera* procedure is a compromise, by which the court can have before it the evidence which it deems relevant without risking disclosure of facts which the government would be unwilling to reveal in open court. Its purpose is to get away from the mere possibility that an informer who was present or participated, or both, would give testimony helpful to the defendant, by giving the trial judge an opportunity to decide whether in fact the informer's testimony will be helpful. *See United States v. Day,* 3 Cir., 1967, 384 F.2d 464, 470 (McLaughlin, J., concurring).

June 11, 1975, at 265 Merill Lane, Fremont CA. On that day, I had occasion to purchase Exhibit #1 from defendant Richard C. GALLEGOS. Prior to this day on approximately three occasions, the informant advised GALLEGOS of a prospective buyer of heroin. Subsequently, the informant introduced me to GALLEGOS on June 11, 1975. The informant played a minor role in the negotiations. Her only substantial contribution being the introduction of myself to GALLEGOS.

During the actual transaction, which occurred in a back room behind closed doors at 265 Merill Lane, the informant remained in the kitchen area. The informant was able to observe that portion of the transaction when GALLEGOS went into the kitchen to weigh the heroin and overhear GALLEGOS' remark about the quality of the heroin. GALLEGOS returned to the back room to complete the transaction with myself. GALLEGOS, after receiving payment for the heroin from myself, returned to the kitchen. The informant was able to observe GALLEGOS hand defendant Robert BIGELOW an unknown amount of money and overhear GALLEGOS advise BIGELOW that he would come up with the remainder of the money at a later time. Since this day, to my knowledge, the informant has had no contact with GALLEGOS or BIGELOW.

On the third week of September, 1975, Gilbert GONZALEZ, a resident of the Pathway Drug Abuse Clinic, San Jose, CA, came forth to the supervisor of the clinic and advised same that he had been approached by two Mexican individuals on two separate occasions to enlist his aid in doing great bodily harm and/or killing the informant. The informant believes that the Mexican individuals were contacted by the Joseph Michael SCULLY/Mitchell BASAS heroin distribution organization. The threats were substantive enough for the government to relocate the informant to another drug treatment clinic.

In addition to the GALLEGOS case, the informant is also responsible for case CR-75-554 LHB which is set for trial on December 1, 1975. The defendants in this case are associated with GALLEGOS so the possibility exists that disclosure of the informant's identity in one case could affect the other.

On numerous occasions during a period of approximately four months, the informant provided valuable information to the government which was appropriately corroborated by the agents. This information has resulted in investigation and arrests of two separate factions of heroin traffickers. Further, the informant volunteered information leading to the swift apprehension of one of the defendants of the aforementioned case who had moved out of state during the investigation. Throughout her tenure with the government, the informant has expressed a sincere desire to aid the government in apprehending narcotic traffickers, especially those involved in hard drugs.

/s/ SAL DIJAMCO
SPECIAL AGENT
DRUG ENFORCEMENT ADMINISTRATION

Sworn and Subscribed to
before me on this 20th day
of October, 1975
/s/ D. MARILYN FORSYTH
NOTARY PUBLIC
450 Golden Gate Avenue
San Francisco, California 94102

The great danger of secret *ex parte* hearings is that they may fail to be sufficiently probative; the only safeguard is the commitment of the trial judge to a full and probing inquiry. Unless the trial judge can satisfy himself as to what testimony the informant would offer if called as a witness, he cannot determine whether the informant's testimony will be of assistance to the defendant. *United States v. Lopez,* E.D.N.Y., 1971, 328 F.Supp. 1077, 1091 (Weinstein, J.). An affidavit by the chief prosecution witness, a government agent whose testimony the defendant seeks to impeach, stating that the informant, if called as a witness, would corroborate his testimony, is not sufficiently reliable to be the basis upon which to deny disclosure. *Cf. United States v. Johnson,* 9 Cir., 1975, 521 F.2d 1318, 1320. The possibility that Dijamco inaccurately or incompletely reported, purposefully or innocently, what the informant told him, is simply too great. The district court erred in basing its decision on Dijamco's affidavit.

The holding in *Roviaro* was that the informant's identity should have been disclosed. This was based on the fact that the informant was a percipient witness and a participant in the offense. Thus, while *Roviaro* makes it clear that each case will turn on its own facts, it also stands for the proposition that, absent other evidence showing that the government's interest in keeping the informant's identity confidential should control, a showing like that in *Roviaro* carries, prima facie, the defendant's burden of establishing need for the disclosure. Such a showing was made here, and the *in camera* evidence was insufficient to overcome it.

The result that we reach is not contrary to our decisions in *United States v. Marshall,* 9 Cir., 1975, 526 F.2d 1349, 1359, or *United States v. Alvarez,* 9 Cir., 1973, 472 F.2d 111, 113, *cert. denied,* 412 U.S. 921. Those cases concerned informants whose testimony was relevant only to motions to suppress, not to the determination of guilt. Procedures deemed acceptable there are not necessarily satisfactory here, as more stringent standards apply to proceedings directly affecting the verdict. *See McCray v. Illinois,* 1967, 386 U.S. 300, 309-12; *Riley v. United States,* 9 Cir., 1969, 411 F.2d 1146, 1151-53, *cert. denied,* 1970, 397 U.S. 906.

II. *Instructions on remand.*

We do not reverse and order a new trial, because it is not clear from the evidence before us that the district court's error was prejudicial. On remand the district court may hold a hearing to determine what the informant would have said had she been called as a witness at trial. If at such a hearing it determines that her testimony would not have been both "relevant and helpful" to the defendant, it may reinstate the judgment of conviction; otherwise, it must grant a new trial.

III. *Evidentiary objections.*

Because the district court may on remand reinstate the conviction, we deal here with the defendant's remaining assignments of error.

His first argument, that there was insufficient independent evidence of a conspiracy existing at the

time of Gallegos' out-of-court declarations to allow their admission, is without merit. "All that is required is enough to make a *prima facie* case [of conspiracy]," *United States v. Calaway,* 9 Cir., 1975, 524 F.2d 609, 612, *cert. denied,* 1976, ... U.S. ..... [96 S. Ct. 1462], and more than that was present here.

The exclusion of testimony proffered by the defendant is more troublesome. Bigelow's brother, Gary, who was in Gallegos' house at the time of the heroin sale, was prepared to testify that Bigelow had become very upset and had yelled at Gallegos: "What's going on? What's going on here? . . . Give me the money so we can go. . . . We want to go." The district court incorrectly labelled this hearsay; it was a classic example of verbal conduct. The significance of these statements lies not in the truth of what they assert, but in the fact of their being said. *See Calaway, supra,* 524 F.2d at 613 & n.1; Rule 801(c), Fed. R. Evid. However, under the circumstances of this case we are convinced the error was harmless. Not only was Gary the defendant's brother, he also suffered, by his own admission, from an 80% hearing loss. He had to read counsel's lips in order to understand the questions asked of him. In addition, he had earlier testified that the defendant was extremely angry at Gallegos and upset at approximately the time the heroin sale took place; hence, the evidence excluded was substantially cumulative. This error did not deprive Bigelow of a fair trial.

The judgment of conviction is vacated and the case remanded to the district court for further proceedings consistent with this opinion.

Appendix B

(CORRECTED)
DO NOT PUBLISH

United States Court of Appeals
For the Ninth Circuit

No. 75-3845

United States of America,
Plaintiff-Appellee,
vs.
Robert D. Bigelow,
Defendant-Appellant.

[January 5, 1977]

ORDER

Before: DUNIWAY and CARTER, Circuit Judges,
and BURNS,* District Judge

The government's motion to correct and augment the record on appeal is granted. The record is hereby augmented by including in it the following papers:

1. Memorandum of Judge Orrick to this panel, dated October 21, 1976.

2. Affidavit of Julie Frost, dated October 17, 1975, and filed in the district court under seal on November 21, 1975.

*The Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation

3. Memorandum Opinion of Judge Orrick, dated November 19, 1975, and filed in the district court under seal on November 21, 1975.

The government's petition for a rehearing is granted. The opinion and judgment of this court, filed on October 20, 1976, are withdrawn. The court does not desire further briefing, and no additional oral argument will be heard. The case is resubmitted for decision.

United States Court of Appeals
For the Ninth Circuit

No. 75-3845

United States of America,
Plaintiff-Appellee,
vs.
Robert D. Bigelow,
Defendant-Appellant.

[January 5, 1977]

Appeal from the United States District Court
for the Northern District of California

MEMORANDUM

Before: DUNIWAY and CARTER, Circuit Judges,
and BURNS,* District Judge

Substantially for the reasons stated by Judge Orrick in his November 19, 1975 opinion, we hold that it was not error to refuse to require disclosure of the identity of, or production of, the informer at the trial.

Bigelow's argument that there was insufficient independent evidence of a conspiracy existing at the time of Gallegos' out-of-court declarations to allow

*The Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation

their admission, is without merit. "All that is required is enough to make a *prima facie* case [of conspiracy]," *United States v. Calaway,* 9 Cir., 1975, 524 F.2d 609, 612, *cert. denied* 1976, ... U.S. ..... [96 S. Ct. 1462], and more than that was present here.

The exclusion of testimony proffered by the defendant is more troublesome. Bigelow's brother, Gary, who was in Gallegos' house at the time of the heroin sale, was prepared to testify that Bigelow had become very upset and had yelled at Gallegos: "What's going on? What's going on here? . . . Give me the money so we can go. . . . We want to go." The district court incorrectly labelled this hearsay; it was a classic example of verbal conduct. The significance of these statements lies not in the truth of what they assert, but in the fact of their being said. *See Calaway, supra,* 524 F.2d at 613 § n.1; Rule 801(c), Fed. R. Evid. However, under the circumstances of this case we are convinced that the error was harmless. Not only was Gary the defendant's brother, he also suffered, by his own admission, from an 80% hearing loss. He had to read counsel's lips in order to understand the questions asked of him. In addition, he had earlier testified that the defendant was extremely angry at Gallegos and upset at approximately the time the heroin sale took place; hence, the evidence excluded was cumulative. This error did not deprive Bigelow of a fair trial.

Affirmed.

Do Not Publish

Appendix C

(TO BE SEALED)

United States District Court
Northern District of California

No. CR-75-563 WHO

United States of America,
Plaintiff,

vs.

Richard Gallegos, DeeDee Gallegos, and Robert Bigelow,
Defendants.

[Filed Nov. 21, 1975]

MEMORANDUM OPINION

The defendants in this criminal case have moved to discover the identity of an informant. The principal issue before this Court is whether the informant here was a material witness to an alleged illegal drug transaction, whose testimony would be relevant and helpful to the defendants, and whose identity must, therefore, be disclosed. *Roviaro v. United States,* 353 U.S. 53 (1957).

For the reasons hereafter stated, I have found that, under the circumstances here present, the informant was not a material witness, did not take a material part in the alleged transaction, and could

not offer testimony relevant and helpful to the defendants. Therefore, I have denied defendants' motions.

I.

On July 7, 1975, an indictment was returned against Richard Gallegos, DeeDee Gallegos, and Robert Bigelow. In Count One, Richard Gallegos and Robert Bigelow was charged with violating 21 U.S.C. §841(a)(1) by knowingly and intentionally distributing approximately 12.1 grams of heroin on June 11, 1975. In Count Two, Richard Gallegos was additionally charged with a second violation of the same nature which allegedly took place on June 18, 1975, and DeeDee Gallegos was charged with violating 18 U.S.C. §2 by aiding and abetting this second distribution of 21.2 grams of heroin.

On October 16, 1975, the Court heard defendants' motions for disclosure of the identity of the informant. Defendants Richard and DeeDee Gallegos moved for disclosure on the ground that it would be relevant and helpful to their defense of entrapment, while defendant Robert Bigelow made a similar motion on the ground that said informant was a material witness to the transaction comprising the alleged offense in this case. The government, in opposition to these motions, provided the Court and defendants with a Drug Enforcement Administration Report of Investigation DA4-H1 (R3-75-0067), which detailed the alleged illegal transaction and role that the informant, identified only as SR350030, had played.

After considering the papers submitted by all parties and hearing oral argument on these motions, pursuant to Supreme Court Standard 510, I ordered the government to submit further affidavits, including one from the informant, for *in camera* inspection to aid in this decision.[1] The government was ordered to supply at least the following additional information in these affidavits:

1. What was the initial behavior of the informant in laying the groundwork for the introduction of the Drug Enforcement Administration agent involved to the defendants?

2. To what portions, if any, of the alleged illegal transaction was the informant a witness?

3. What behavior of the defendants did the informant see or hear during the informant's entire visit to 265 Merrill Lane on June 11, 1975?

4. What possibility of harm to the informant will exist of identity is disclosed?

5. If identity is disclosed, will there be either a cessation of the informant's usefulness to the government or the possible frustration of other investigations?

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[1]Supreme Court Standard ¶510(c)(2):
"*Testimony on merits.*—If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the government is a party, and the government invokes the privilege, the judge shall give the government an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits • • •." 2 Weinstein, ***Evidence***, ¶510-1 (1975).

6. Is the informant a credible person?

On October 20, 1975, the Court received affidavits *in camera* from (1) Eb F. Luckel, Jr., the Assistant United States Attorney handling this case; (2) Sal Dijamco, the Drug Enforcement Administration Special Agent, who participated in the alleged illegal transaction; and (3) the informant. After extensive *in camera* consideration of these affidavits, as well as all other papers submitted by all parties, I determined the following to be relevant facts:

1. The informant spoke to defendant Richard Gallegos by telephone on three occasions in early June, 1975, telling him she knew someone interested in buying some heroin.

2. On June 11, 1975, the informant accompanied Drug Enforcement Administration Special Agent Sal Dijamco to the residence of defendants Richard and DeeDee Gallegos at 265 Merrill Lane, Fremont, California, where they were met at the door by DeeDee Gallegos. After entering the living room, Richard Gallegos joined them and the informant introduced the Special Agent to Richard Gallegos.

3. The informant engaged DeeDee Gallegos in general conversation in one part of the living room and took no part in the ensuing conversations between the Special Agent and Richard Gallegos.

4. The alleged illegal transaction between Richard Gallegos, Robert Bigelow, and the Special Agent took place during approximately the next two hours in an official government vehicle, Richard Gallegos' vehicle,

and rooms of the Gallegos' residence other than the one in which the informant stayed the entire time.

5. The informant neither observed nor took an active part in the negotiations leading up to the actual transaction, nor in the actual transaction itself. According to the informant's affidavit and that of the Special Agent, during this entire transaction, the informant only saw Richard Gallegos when he went into the kitchen at 265 Merrill Lane at one point to weigh the heroin. She heard him say it was good heroin. Later she saw Richard Gallegos give Robert Bigelow some money.

6. The informant departed 265 Merrill Lane with the Special Agent after the alleged transaction had been completed and had no further contact with any of the defendants.

II.

Defendants contend that the informant's identity must be revealed because she is a *material witness,* relying on *Roviaro v. United States, supra.* Close examination of specific circumstances is necessary to test this contention because, as Justice Burton admonished:

> "We believe that no fixed rule with respect to disclosure is justifiable * * *. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case * * *." *Roviaro v. United States,* 353 U.S. at 62.

The specific circumstances in *Roviaro* which led the Supreme Court to conclude the informant was a

material witness are absent in this case. Unlike the informant in *Roviaro,* the informant here did not participate in any way in the alleged transaction, nor did the informant even observe it fully. The informant here came to the door of 265 Merrill Lane on June 11, 1975, with a government Drug Enforcement Administration undercover agent and, after entering, simply sat in the living room either alone or conversing with DeeDee Gallegos (who is not charged for any of her acitivities on June 11, 1975). The informant was neither in the automobiles nor the back room where the illegal negotiations and heroin sale are alleged to have occurred. The informant states in her affidavit that after initially entering the residence, she saw defendants Richard Gallegos and Robert Bigelow only fleetingly as they exited and entered the back room.

Unlike the informant in *Roviaro,* this informant is not the defendants' "one material witness", did not play "a prominent part" in the transaction, and is not the only witness who might testify as to defendants' knowledge and intent. *Roviaro,* at 64. This is *not* a case "where the government's informer was the sole participant, other than the accused, in the transaction charged". *Roviaro,* at 64.

The informant's lack of active participation and absence from the room where the alleged transaction took place make her minimal involvement clearly distinguishable from the substantial involvement standard evolved by the Ninth Circuit in the wake of *Roviaro.* In the leading Ninth Circuit cases in which

courts held nondisclosure of the identity of informants to be reversible error, the informants had been active participants in and observers of entire illegal transactions. In *Velarde-Villerreal v. United States,* 354 F.2d 9 (9th Cir. 1065), the informant was present and participated in the sale of heroin to government agents; in *Lopez-Hernandez v. United States,* 394 F.2d 821 (9th Cir. 1968), the informant was both a participant and witness to the heroin transaction involved, as was the informant in *United States v. Leon,* 487 F.2d 389 (9th Cir. 1973).

III.

Justice Burton's dissection of the factual circumstances in *Roviaro* clearly suggests that the Supreme Court's principal concern was the degree of involvement of the unidentified informant. To signify that degree of involvement which made disclosure necessary, Justice Burton used the term "material"; the "principal issue" was whether the informant "had taken a material part in bringing about the possession of certain drugs by the accused * * * and might be a material witness * * *." At 55.

> Black's Law Dictionary defines "material" as:
> "important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form."

Using this definition, the principal issue in this case can be rephrased. Was the part played by the informant or that portion of the transaction which she witnessed important, going to the merits, to such

a substantial degree that her testimony is necessary, since it will have an influence or effect on the fair determination of this case?

Without restating the specific facts outlined above, I rely on them in finding that what this informant saw or participated in was neither so important or necessary, nor does it go to the merits to such a degree that nondisclosure will deny defendants a fair determination of their case. See, *Mims v. United States,* 254 F.2d 654 (9th Cir. 1958); *Wilson v. United States,* 250 F.2d 312 (9th Cir. 1958).

IV.

Defendants contend the informant's identity should be revealed because it would be "relevant and helpful" to their case. Justice Burton, expressing an underlying concern for the "fundamental requirements of fairness", stated that "where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense", the identity must be revealed. *Roviaro,* at 60.

I have already found disclosure to be unnecessary as to relevancy since the informant was not a material witness. In addition, I also find disclosure in this case would not be "helpful". Revealing this informant's identity could not possibly be helpful to the defense of the accused. Informant's testimony would, if anything, only hurt defendants. The informant caught only fleeting glimpses of the defendants in the course of the time during which the alleged transaction took place—she states in her affidavit that she saw Richard Gallegos give Robert Bigelow an undisclosed amount of money. Testimony to this effect could only be prejudicial to the defendants. They would not be denied a fair determination of their cause by having the informant's identity withheld and this prejudicial testimony thereby disclosed. If any party will be prejudiced by nondisclosure, it is not the defendants, but the government, which nevertheless seeks to have the identity of the informant withheld.

V.

Defendants DeeDee Gallegos and Richard Gallegos contend that the informant's identity is necessary to allow them to prepare an adequate entrapment defense. However, the defendants have failed to bear the burden of proving disclosure is necessary for this defense. *United States v. Kelly,* 449 F.2d 329, 330 (9th Cir. 1971). There is nothing to suggest that this informant's minimal involvement in any way entrapped the defendants.

As Justice Rehnquist wrote in *United States v. Russell,* 411 U.S. 423, 435 (1973), "entrapment is a relatively limited defense", available only to a person who had no prior disposition to commit the alleged illegal acts, who "was induced to commit them by the Government * * *. It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play". In this case, the informant only made an introduction of a potential buyer to a potential seller; there is no suggestion in any

of the papers submitted that she in any way encouraged or helped the defendants to make the alleged subsequent sale.

In the absence of any suggestion of entrapment other than the defendants' bare allegation in their moving papers, I join the courts which "have been loath to order disclosure when they feel that the defense would be unavailing". 2 Weinstein, *Evidence,* ¶510(6) (1975), citing with approval, e.g., *United States v. Fredia,* 319 F.2d 853 (2d Cir. 1963).

VI.

Other relevant factors have also been considered as Justice Burton encouraged in *Roviaro* (at 62); all weigh heavily against disclosure.

First, enforcing drug-related laws has proven particularly difficult. As Justice Rehnquist wrote:

> "* * * the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices." *United States v. Russell,* 411 U.S. at 432.

This means of detection and enforcement necessitates government use of unidentified informers and only by insuring their anonymity can the government maintain a continuous "flow of information" (*Roviaro,* at 62) about this illicit trade.

Second, the informant's life is already in jeopardy, and disclosing her identity might bring her grave bodily harm. The government has already taken this jeopardy seriously enough to transport her out of this District and State.

Third, Special Agent Dijamco has attested to this informant's continuing usefulness in enforcing drug-related laws and this usefulness should not be interrupted.

The motions to discover the identity of the informant are denied.

Dated: November 19, 1975.

/s/ William H. Orrick
William H. Orrick
United States District Judge

Appendix D

United States Court of Appeals
For the Ninth Circuit

No. 75-3845

United States of America,
Plaintiff-Appellee,
vs.
Robert D. Bigelow,
Defendant-Appellant.

[Filed Mar. 1, 1977]

ORDER

Before: DUNIWAY and CARTER, Circuit Judges,
and BURNS,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

*The Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

Appendix E

Supreme Court of the United States

No. A-752

Robert D. Bigelow,
Petitioner,
vs.
United States

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 29, 1977.

/s/ William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 16 day of March, 1977.